STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL FAULMAN,

Plaintiff-Appellant,

v

AMERICAN HEARTLAND HOMEBUILDER, LLC,

Defendant-Third-Party Plaintiff-Appellee,

v

JAG CONSTRUCTION,

Third-Party Defendant-Appellee.

UNPUBLISHED
January 4, 2007

No. 269287
Macomb Circuit Court
LC No. 04-004961-NO

Before: White, P.J. and Zahra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant/third-party plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiff's negligence action on the ground that the "common work area doctrine," an exception to the rule that general contractors cannot be held liable for the negligence of independent subcontractors and their employees, *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004), did not apply. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was employed by third-party defendant JAG Construction ("JAG"), a subcontractor hired by defendant/third-party plaintiff American Heartland Homebuilder, LLC ("defendant"), the general contractor of a new condominium construction project, to perform all of the rough carpentry work on the project. Plaintiff was assisting approximately 14 or 15 other JAG employees in lifting a second-floor gable wall when a "kicker" that was securing the bottom of the wall gave way. The wall slipped out from the bottom and fell, trapping plaintiff underneath and causing injuries to his back.

The trial court granted defendant's motion for summary disposition, concluding that plaintiff had failed to demonstrate the existence of a common work area and that defendant, as general contractor, could not be held liable for the negligence of JAG, its subcontractor.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004); *Tipton v William Beaumont Hosp*, 266 Mich App 27, 32; 697 NW2d 552 (2005). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). "When a motion under [MCR 2.116(C)(10)] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Lind, supra* at 238; *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

A contractor is generally not liable for the negligence of independent subcontractors and their employees. *Ormsby, supra* at 48-49. The "common work area doctrine," set forth in *Funk v General Motors Corp*, 392 Mich 91; 220 NW2d 641 (1974), overruled in part on other grounds, *Hardy v Monsato Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982), provides an exception to the general rule of nonliability. *Ormsby, supra* at 49. For a general contractor to be held liable under the *Funk* common work area doctrine, a plaintiff must show that "(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Id*. at 54. The failure to satisfy any one of these elements is fatal to a common work area claim. *Ormsby, supra* 59.

Plaintiff has failed to come forward with evidence demonstrating that defendant failed to take reasonable steps to guard against a readily observable and avoidable danger. Plaintiff testified that this was his second or third time lifting a wall, and that he would not have done anything that he considered dangerous. The record contains no indication that either the wall or the manner of its raising constituted an observable or avoidable danger; nor does it contain any evidence regarding the "reasonable steps" that should have been taken by defendant to guard against such a danger. The testimony demonstrates that JAG's foreman, Todd Ramsey, had sole control over the manner in which walls would be raised, and there is no evidence that defendant's employees had any knowledge of the wall or of the JAG crew's attempt to raise it by hand. Plaintiff's bare assertion that "[t]he lifting of a 30 foot by 15 foot [gable] wall by hand is clearly a readily observable and certainly avoidable danger" is not sufficient to create a fact issue.[1]

[1] Plaintiff additionally states, without providing documentary evidence, that his expert "will
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Nor has plaintiff demonstrated the existence of a genuine issue of material fact concerning the interrelated third and fourth elements of the *Funk* test—the creation of a high degree of risk to a significant number of workmen in a common work area. The test does not require that multiple subcontractors be working on the same site at the same time, but only that employees of two or more subcontractors will eventually work in the area. *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 75; 600 NW2d 348 (1999); *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997); *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994), abrogated by *Ormsby, supra*. However, there is a world of difference between the facts of this case and the facts of *Funk*, *supra*, in which "[l]iability was imposed on the general contractor … because Funk fell from a highly visible superstructure that was part of the common work area, was within the control of the defendant, and posed a risk to thousands of other workers." *Hughes*, *supra* at 7. Although the evidence is conflicting as to whether other subcontractors were from time to time present on the jobsite while JAG was performing its rough carpentry work, plaintiff has not submitted any evidence that these other subcontractors, even if they were on the premises, were ever present on the second floor of the condo or were ever subjected to any danger presented by the wall or its raising. The uncontroverted testimony establishes that only seven JAG employees were routinely present in the condo in which plaintiff's accident took place, and that only 15 JAG employees were present when the wall was being raised. There is no indication that any danger existed prior to or after the unsuccessful attempt to raise the wall. Thus, it cannot be said that there was ever any "high degree of risk to a significant number of workmen." See *Hughes*, *supra* at 8 (holding that, where only four men were potentially exposed to the risk of a collapsing roof overhang located twenty feet off the ground, the plaintiff failed to demonstrate the existence of either a high degree of risk to a significant number of workmen or a common work area).

Similarly, we conclude that the fourth element of the *Funk* test—"common work area"—cannot be satisfied on these facts. The *Ormsby* Court quoted with approval this Court's analysis in *Hughes*, *supra* at 8-9, concerning the "common work area" element:

> "[T]he Court's use of the phrase 'common work area' in *Funk, supra*, suggests that the Court desired to limit the scope of a general contractor's supervisory duties and liability. *We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard*. In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work. In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will 'render it more

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testify" that federal law required the use of a boom or crane in the raising of this wall. This, too, is insufficient to create a genuine issue of fact for trial. A court may only consider substantively admissible evidence *actually proffered* relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden, supra* at 121.

> likely that the various subcontractors . . . will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas.' *Funk*, *supra* at 104. [*Ormsby*, *supra* at 57 n 9 (emphasis supplied; citations omitted).]

Although two witnesses testified that other subcontractors were sometimes present on the project premises, neither could provide any specific information as to when or precisely where such workers were present, or whether they were ever present in an area in which JAG was performing rough carpentry work. Moreover, there is no indication that any other subcontractors were ever present in the specific area where the accident occurred. Thus, this case clearly presents a "'situation where employees of a subcontractor were working on a unique project in isolation from other workers,'" rather than a "'situation where employees of a number of subcontractors were all subject to the same risk or hazard.'" *Ormsby*, *supra* at 57 n 9, quoting *Hughes*, *supra* at 8. Under these circumstances, no "common work area" within the meaning of *Funk* and *Ormsby* exists.

Affirmed.

/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly